COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, Petitioner, v. LAURA MARSHARD, Respondent.	)	B.B.O. File Nos. C1-14-0055 C5-16-0008

BOARD MEMORANDUM

A hearing committee concluded that the respondent, an assistant district attorney, violated Mass. R. Prof. C. 4.2 and 8.4(d) when she met with a represented witness without the consent of the witness's lawyer. For the reasons set forth in this Memorandum, we affirm and adopt the committee's factual findings and legal conclusions. Because we conclude that the respondent abused her prosecutorial power – aggravated by her misrepresentations to a judge – we disagree with the recommended sanction of public reprimand; instead we recommend that the respondent be suspended for one month with her reinstatement conditioned on the successful completion of a legal ethics class approved by bar counsel.[1]

[1] Neither party has appealed the hearing report, so we review it pursuant to Section 3.52 of our rules. After the hearing committee issued its report, bar counsel and the respondent filed a Stipulation, agreeing that the respondent should receive a public reprimand and at the same time submitting a proposed public statement about the case that they asked the board to approve and issue. A condition of the stipulation was that the board issue the statement verbatim. We declined to do so, since we found the statement to be inaccurate. As a general matter, the board will not agree to statements drafted by the parties, particularly if they do not reflect the facts of the case as found by the hearing committee. Furthermore, as we discuss in this Memorandum, the respondent's conduct warrants a more severe sanction than a public reprimand.

The Committee's Findings of Fact and Conclusions of Law

We affirm the facts found by the hearing committee, as they are supported by the evidence and not erroneous. BBO Rules, § 3.53.

The Petition for Discipline charged the respondent in three counts, only one of which is relevant here.[2] In Count 2 of the petition, bar counsel alleged that the respondent violated Rule 4.2 of the Massachusetts Rules of Professional Conduct when she met with a witness who was represented by a lawyer without first seeking the consent of the lawyer. The meeting took place at the courthouse in Edgartown, Massachusetts and concerned a prosecution for several felonies and misdemeanors arising out of a brawl.

On or about July 27, 2014, Patrice Petersen was involved in a fight with two other individuals, Clayton Santos and Dave Sylvia. The District Attorney charged Petersen with assault and battery with a dangerous weapon, assault and battery on a police officer, mayhem, resisting arrest, and disturbing the peace.

The respondent knew Sylvia, having prosecuted him on numerous misdemeanor charges in the Edgartown District Court over a period of about ten years. On August 11, 2014, about two weeks after the fight, the respondent and an Edgartown police detective met with Sylvia to obtain a statement and ascertain his willingness to cooperate as a prosecution witness. Although initially concerned about retaliation from the other participants in the fight, Sylvia agreed to cooperate and provided a written statement.

Because some of the charges against Petersen were felonies, the district court held a probable cause hearing on September 22, 2014. Mass.R.Crim.P. 3(f). At the first call of the

[2] As discussed at the conclusion of this Memorandum, we affirm the hearing committee's decision that the respondent did not violate the Rules of Professional Conduct as charged in Counts 1 and 3.

case, Petersen's lawyer suggested to the judge that the court appoint counsel for Sylvia and Santos concerning their rights against self-incrimination under the Fifth Amendment. The court appointed Attorney Timothy Moriarty to represent Sylvia, who was in court that day for a magistrate clerk's hearing to determine whether a criminal complaint should issue against him and Santos for the same fight.

After the appointment of Attorney Moriarty, the court held the case for a second call of the list. The respondent asked a police detective to locate Sylvia (who was not in the courtroom when counsel was appointed for him) and bring him to the courthouse law library, which he did. The respondent walked to the library to meet with Sylvia, passing Attorney Moriarty, who was sitting on a bench in the hallway. The respondent's memory of her conversation with Moriarty was imprecise. She could not recall if Moriarty said anything specific to her. She testified that she, "might have said I am going to speak with Mr. Sylvia briefly," and Moriarty said nothing in response. (Hearing Transcript, Volume VII, lines 136-137). Moriarty did not follow her into the library.

Based on the testimony and admissions of the respondent and a memorandum by a detective who was at the meeting, the hearing committee found the following facts with respect to the ensuing conversation with Sylvia in the law library. According to the detective's memorandum, Sylvia seemed agitated, did not understand the conversation, and asked to meet with his court-appointed lawyer. The respondent wanted to inform Sylvia that he was not in trouble, unlike when she had talked with him on other cases in which he was a defendant with appointed counsel, and to explain to him his Fifth Amendment rights. The hearing committee found that the respondent discussed the case with Sylvia and explicitly assured him that he was

not being charged with a crime, was not a target, and would not be charged, all for the purposes of convincing him to testify, a finding that we do not disturb. BBO Rules, § 3.53.

When the judge later asked the respondent if Attorney Moriarty was at the meeting, the respondent initially denied that he had been appointed at the time, an assertion that Moriarty immediately corrected in open court. Obviously, the respondent knew that Moriarty represented Sylvia, since she was in court when Moriarty was appointed, and she had a limited interaction with him on her way to speak with his client.

Eventually, Sylvia waived his Fifth Amendment privilege, and the judge denied Petersen's motion to preclude his testimony, finding that the government had not offered Sylvia any promises, rewards or inducements for his testimony.[3]

The hearing committee concluded that the respondent violated Rules 4.2 and 8.4(d), because she failed to obtain Attorney Moriarty's consent before she met with his client, Sylvia. This finding is not erroneous. As she headed toward the meeting with Sylvia, the respondent – accompanied by two police officers – walked directly past his lawyer. She did not pause to explain what she was doing other than (perhaps) a cursory statement that she was going to meet with Sylvia. She did not ask for Moriarty's consent. She did not obtain Moriarty's consent.

Given these facts, we affirm the conclusion that the respondent violated Rules 4.2 and 8.4(d). Knowing that Moriarty represented Sylvia and that she was about to speak to Sylvia about matters for which Moriarty had been appointed, the respondent was required stop, ask for

[3] Whether the respondent's statement to Sylvia that he would not be charged for the fight constitutes an impermissible "promise, reward, or inducement" for his testimony in the sense at issue before the judge, *see* Mass. R. Crim. P. 14(a)(1)(A)(ix), is not directly relevant to the case before us. Our concern is whether the respondent spoke with Sylvia about matters within the scope of Moriarty's representation. For this purpose, the committee's finding that the respondent told Sylvia that he was not a target in order to persuade him to testify, after Moriarty had been appointed to advise him on this very point, is unimpeachably correct.

consent and obtain consent in a clear manner. This requirement is neither unreasonable nor onerous. The respondent flouted it.

This case illustrates the importance of the rule. Sylvia, who had little education, was confused and frightened. He thought that he was facing criminal charges. While his lawyer sat in the hallway, he was denied the benefit of counsel. He confronted a seasoned prosecutor and two police officers who were pushing him to testify in favor of the government. The respondent had prosecuted Sylvia in the past so her promise (that he would not be charged with a crime if he testified) would naturally carry a great deal of weight. According to the officer's memo, which the respondent did not deny, she discussed with Sylvia his Fifth Amendment rights, a conversation that should have occurred with his lawyer, not the prosecutor.

In addition to the above facts, we note (as did the hearing committee) that the respondent did not deny the allegation in the Petition for Discipline that she "failed to seek permission from Sylvia's counsel to discuss with Sylvia the subject of that counsel's representation of Sylvia." (Petition for Discipline, ¶ 45). Under our rules, allegations in a petition are deemed admitted if not specifically denied. Thus, as a matter of pleading, the respondent has admitted her failure to obtain Moriarty's consent.

Factors in Aggravation and Mitigation

We affirm the hearing committee's findings in aggravation. These include her experience as a prosecutor and her lack of understanding of her ethical obligations on display during her testimony. She also demonstrated a lack of candor before the hearing committee, including outright falsehoods. In addition to lack of candor before the hearing committee, the respondent misled the judge when she falsely told him that Moriarty had not been appointed at the time she met with Sylvia. She knew this statement to be false, because she had been in court

earlier the same day when the court appointed Moriarty. She also misled the judge when she failed to inform him that the government had offered to not prosecute Sylvia if he testified. We affirm the hearing committee's findings to the contrary, specifically that the government had promised Sylvia during the *ex parte* meeting that he would not be prosecuted. Lastly, the respondent's testimony to the hearing committee was false when she testified that at some point during the probable cause hearing she admitted to the judge that she had assured Sylvia that he was not in trouble. There is no evidence in the court transcript to support her version of events.

Although the hearing committee discussed the public nature of this case, it did not rely on it when determining the sanction, and neither do we. However, the Supreme Judicial Court has charged us to consider the "effect upon, and perception of the public of, the public and the bar." Matter of Zak, 476 Mass. 1034, 73 N.E.3d 262, 271 (2017). We also recognize that the rules of professional conduct and the disciplinary proceedings, "[e]xist to protect the public and maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system ... Accordingly, the appropriate level of discipline is that which is necessary to deter other attorneys and to protect the public." Id., at 268.

Affirming the hearing committee, we find no mitigating factors.

Disposition

The hearing committee has recommended a public reprimand. As the committee recognized, unadorned violations of Rule 4.2 typically result in an admonition. AD No. 16-20, 32 Mass. Att'y Disc. R. --- (2016); AD No. 00-46, 16 Mass. Att'y Disc. R. 519 (2000); AD No. 99-77, 15 Mass. Att'y Disc. R. 795 (1999); see also Matter of Kent, 21 Mass. Att'y Disc. R. 366 (2005) (public reprimand for both communicating with unrepresented party and, when that party was later unrepresented, presenting papers for execution without disclosing that he was acting in

the interest of a different party). The committee recommended a reprimand based on its view that the respondent intentionally violated Rule 4.2 and exhibited lack of candor at the hearing as well as other aggravating factors discussed above.

While we agree with the committee's findings and conclusions, we believe that they warrant the more serious sanction of a suspension. We are particularly troubled by the fact that the respondent tried to mislead a judge when she said that the witness did not have appointed counsel at the time she spoke with him and when she failed to inform the judge that the government had offered not to prosecute the witness if he testified. These were lies. The respondent had been in court when counsel was appointed and she admitted at the disciplinary hearing that she had some (albeit limited) interaction with the lawyer on her way to meet with his client. As the hearing committee found, the government *had* offered to not prosecute Sylvia if he testified.

An intentional misrepresentation to a court typically results in a suspension of at least one year. Matter of Moran, ___ Mass. Att'y Disc. R. ___, 479 Mass. 1016 (2018) (rescript); Matter of Neitlich, 8 Mass. Att'y Disc. R. 167, 413 Mass. 416, 422-423 (1992). "As an officer of the court, an attorney is a 'key component of a system of justice,' *Nix v. Whiteside*, 475 U.S. 158, 174 (1986), and is bound to uphold the integrity of that system by being truthful to the court and opposing counsel." Neitlich, 8 Mass. Att'y Disc. R. at 175. As Justice Lowy recently noted, "Truthfulness and candor are the cornerstones upon which the legal profession is built." Matter of Walckner, BD-2017-081, p. 8, n. 4 (March 27, 2018). These traits were notably lacking in this case.

Although bar counsel did not charge the respondent with a violation of Mass. R. Prof. C. 3.3(a) (false statement to a tribunal), we may consider it as a factor in aggravation. Matter of

Strauss, ___ Mass. Att'y Disc. R. ___, 479 Mass. 294, n. 9 (2018); Matter of the Discipline of an Attorney, 448 Mass. 819, 825, n. 6 (2007). Given the multiple misrepresentations to the court, it is appropriate to consider the respondent's falsehoods in aggravation. Accordingly, and cognizant of our responsibility to educate the bar and the public about the bounds of ethical conduct, *see, e.g.*, Zak, *supra.*, a suspension is warranted. We also recommend that the Court require the respondent to complete a class on legal ethics with the approval of bar counsel.

Finally, and while this has no bearing on the outcome of the case, the hearing committee noted that *ex parte* meetings with represented persons are apparently a regular occurrence in the district attorney's office where the respondent works. This is troubling coming from prosecutors, whose broad discretion carries with it "the responsibility of a minister of justice and not simply that of an advocate." Mass. R. Prof. C. 3.8, Comment (1). While Rule 4:2 plays an important role in protecting litigants in all types of cases, we note its special significance in criminal law, where the balance of power tilts strongly in favor of the government. As shown in this case, the government can bring huge resources to bear on a witness. Even if unintentional, the presence of uniformed officers can be intimidating. The threat of prosecution is real. The consequences can be severe.

Findings and Conclusions as to Counts 1 and 3

The hearing committee found no violations of the Rules of Professional Conduct as charged in Counts 1 and 3 of the petition, a conclusion that we do not disturb. In Count 1, which arose out of a different case than Count 2, bar counsel alleged that the respondent violated Mass. R. Prof. C. 3.4(a), 3.4(c), and 8.4(d) when she failed to disclose exculpatory evidence to defense counsel and that she violated Rules 3.4(a), 3.4(e) (as in effect before July 1, 2015), 4.4 and 8.4(c) and (d) when she raised without a good faith basis defense witnesses' potential self-

incrimination. In essence, the hearing committee found that the evidence was not new exculpatory evidence and the respondent had a good faith basis for her Fifth Amendment argument.

We agree. Count 1 concerned a separate criminal case arising out of a bar fight in which bar counsel alleged that the respondent withheld exculpatory evidence from the defendants. Based on detailed findings, the committee found that the evidence – a statement by the bar's owner – was cumulative of information already available to the defendants and therefore not "material" as that term is defined in the criminal law. *See* Mass. R. Crim. P. 14(a)(1)(A)(iii); Commonwealth v. Wilson, 381 Mass. 90, 107 (1980). At the time of the underlying events, the law was unsettled whether a prosecutor's obligations under Mass. R. Prof. C. 3.8(d) were more extensive than under the criminal law.[4] A subsequent comment to Rule 3.8(d) unequivocally expanded its scope to require disclosure, "without regard to the anticipated impact of the information." *See* Mass. R. Prof. C. 3.8, comment 3[A]. But at the time of this case, there was no reason for a prosecutor in the position of the respondent to view her ethical obligations as broader than those under criminal law. Accordingly, bar counsel did not meet her burden to show that the respondent violated Rule 3.8(d) or 8.4(d) when she did not turn over evidence that the hearing committee found was cumulative of information previously known to the defendants.

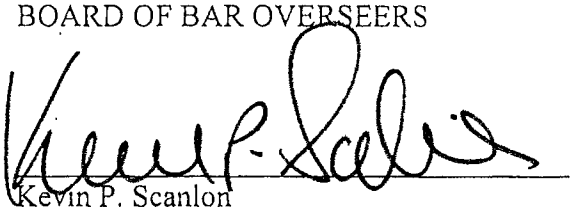
Also on Count 1, bar counsel alleged that the respondent tried to obstruct justice by improperly raising issues of self-incrimination on the part of three defense witnesses. The hearing committee properly concluded that the respondent had a legitimate legal and factual basis for raising the witnesses' Fifth Amendment issues. Indeed, as to one witness, the issue was raised by the trial judge, not the respondent.

[4] Rule 3.8(d) requires that a prosecutor timely disclose to the defense, "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, ..."

In Count 3, arising out of a third underlying case, bar counsel alleged violations of Rules 3.3(a)(4) (as in effect before July 1, 2015) and 8.4(c) and (h) when she failed to correct grand jury testimony she later learned was false or failed to adequately prepare for the grand jury in violation of Rules 1.1, 1.2, 1.3 and 8.4(d) and (h). The hearing committee concluded that bar counsel had not met her burden of proving that the respondent intentionally misled the grand jury or failed to prepare adequately, characterizing her conduct as a "mistake" by an overworked prosecutor. Again, we affirm this finding and conclusion.

Respectfully submitted,

BOARD OF BAR OVERSEERS



Kevin P. Scanlon
Secretary

Dated: May 14, 2018